IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8143 OF 2003

Mahesh Kumar Modi ..Petitioner.

Vs.

Vineet Kumar ..Respondent.

...

None for the Petitioner.
Mr. Jose George h/f Mr. Rajan Kakkara for the Respondent.

...

CORAM: DR. D.Y. CHANDRACHUD, J.

10th July, 2006.

P.C. :

1. While issuing notice in this Petition on 8th December, 2003 the Learned Single Judge directed that the Petition shall be heard and finally disposed of at the stage of admission. Counsel appearing for the Petitioner was heard on 3rd July, 2006 and the matter was directed to stand order to 5th July, 2006 for hearing counsel appearing for the Respondent.

2. Counsel appearing for the Respondent has been heard.

3. The Respondent is the original plaintiff in a suit instituted before the Small Causes Court for a declaration of tenancy. The

suit premises comprise of Flat No.41 situated on the 6th floor of a building known at Shreyas Co-operative Housing Society at 180 Madam Cama Road, Mumbai 400 020. In paragraph one of the Plaint the Plaintiff has made the following averments :

> "The Plaintiff is the tenant in respect of Flat No.41, 6th floor, Shreyas Co-operative Housing Society, (hereinafter referred to as the 'said society') Madam Cama Road, Bombay 400 020, admeasuring about 1050 sq. ft., consisting of three bed rooms, one dining hall, one kitchen, one store room, two toilets, bathrooms and at front facing open balcony, (hereinafter referred to as the "suit premises"), and has his address as shown in the cause title above. The Defendant is a member and share – holder of the said society and as such, the owner and the landlord of the Plaintiff in respect of the suit premises."

It appears that when the written statement was originally filed, the contents in paragraph 1 were dealt with as follows :

> "1. The suit is bad for non-joinder of necessary parties in as much as, it is well within the knowledge of the Plaintiff who has been in the employment of Modi Spg. & Wvg. Mills Co. Ltd., Modinagar, Dist. Gaziabad, U.P. Since 24th June, 1976, initially as Officer on Special Duty and thereafter as Resident General Manager of the Company at its Bombay Office, that the disputed premises i.e. Flat No.41, Shreyas Co-operative Housing Society Ltd., Bombay, although held in the name of the Defendant, was purchased by the said Company from the Company's funds and has always been declared as an asset of the Company, in the records of the company.

Enclosed herewith as Exhibit-1 is a true copy of the Extract of the Minutes of a meeting of the Board of Directors of the Company held on 31st October, 1973 in terms of which, the Board of Directors approved and confirmed the purchase of the said flat, at a cost of Rs.1,24,500/- in the name of the Defendant, a Director of the Company, and further resolved that a Deed of Disclaimer be obtained from the Defendant in favour of the Company, in respect of the said flat.

As is evident from the said document, the flat was purchased in the name of the Defendant, a Director of the Company, since as per the rules and regulations of the Housing Society, only an individual could be a member of the Society and could hold a flat in the building. As such, the investment towards purchase of the flat was made by the Company in the name of the Defendant, one of the Directors of the Company, for the business of the Company.

Enclosed herewith as Exhibit-2 is a Notarized copy of another Extract of the minutes of the said meeting of the Board of Directors held on 31st October, 1973 wherein the Board of Directors approved and confirmed the investment of Rs.3,000/- made by the Company, in the share capital of Housing Society, for purchase of shares in the name of the Defendant since, as per the rules of the Society, the shares could not be held in the name of the Company, but only in the name of an individual.

Enclosed herewith as Exhibit-3 is a true copy of the Twenty Eighth General Report of the Company for the year 1973-74 wherein, at Annexure-19 of the Balance Sheet and Profit & Loss Account of the Company, under the sub head “Notes on The Accounts” buildings includes the written down value of the ownership rights of three flats in the said Housing Society, including the suit premises, although held in the name of the Defendant.

Enclosed herewith as Exhibit-4 is a true copy of the Deed of Disclaimer dated 30th May, 1974 executed by the Defendant in favour of the Company, in regard to the said flat.

In this connection, it is relevant to refer to a petition for winding up filed against the company by a creditor of the Company, in the High Court of Judicature at Allahabad, being Company Petition No.12 of 1983. In the course of the proceedings before the High Court in the said petition, the High Court had constituted a Property Disposal Committee, for taking effective step to dispose of by sale, unproductive assets of the Company included various immovable properties owned by the Company which were to be sold by the Property Disposal Committee.

One of the immovable properties included in the list of unproductive assets was the suit premises. Vide an order dated 23rd December, 1987, the High Court had directed inter alia, that the Property Disposal Committee may take steps for disposal of residential flat Nos.29 and 41, i.e. the suit premises, on the terms directed by the Court. A true copy of the said order dated 23rd December, 1987 is enclosed as Exhibit-5.

At a meeting of the Property Disposal Committee held on 18th January, 1988 it was decided inter alia, that an application be moved in the High Court at Allahabad to release the suit premises from the list of unproductive assets, not well the same, and for the Court's permission to continue to use the suit premises as the local office cum residence of the Resident General Manager in order that the essential business/ work of the company should continue smoothly without disruption or hindrance. A true copy of the said Minutes of the meeting of the Property Disposal Committee dated 18th January, 1988 be enclosed herewith as Exhibit-6.

In the meanwhile, however the Company had

> been declared a Sick Industrial Company by the Board for Industrial and Financial Reconstruction (BIFR) and hence further proceedings in the winding up petition were stayed by the High Court vide an order dated 19th November, 1990.
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> In this view of the matter, the said flat having been purchased by the Company from its own funds and even having been accepted by the High Court at Allahabd, as one of the Properties owned by the Company, the said Company is a necessary party to the suit and the Plaintiff's failure to implead the company as a Defendant in the suit, merits dismissal of the plaint."

4. Hence in the written statement as originally filed, the case of the Petitioner who is the original defendant was that the suit premises although held in the name of the Petitioner, were purchased by the company from the funds of the company and have been declared as the assets of the company. An application for amendment of the written statement was made in August 2002. That application was dismissed by the Small Causes Court by the impugned order dated 15th September, 2003. The Trial Judge in the Small Causes Court was of the view that the application for amendment would amount to a withdrawal of the admission which was made and that therefore the amendment should not be allowed.

5. Now a perusal of the pleadings would show that the Respondent has claimed a declaration of tenancy in the Small Causes Court. Hence, it is for the Respondent to plead and prove the existence of the relationship of landlord and tenant between the parties. The case of the Respondent is that the Petitioner is the landlord. In the written statement as originally filed, the Petitioner sought to set up a case that it was the company which had paid for the purchase of the premises which were in the name of the Petitioner. This averment is now sought to be substituted by an averment to the effect that the premises are of the ownership of the Petitioner. The Petitioner also seeks to introduce certain additional averments denying that any tenancy was created in favour of the Respondent. In these circumstances, having regard to the facts of the case it cannot possibly be submitted that by the application for amendment, an admission that would prejudicially affect the Respondent is sought to be withdrawn. At the hearing of the Petition, I had called upon counsel appearing for the Respondent to indicate to the Court as to whether any of the proposed averments would amount to a withdrawal of an admission against the Respondent. Counsel appearing for the Respondent has fairly stated that none of the averments which are

sought to be introduced by way of the proposed amendment to the written statement prejudicially affect the Respondent since ultimately it is for the Respondent to establish his case in support of the relief claimed of a declaration of tenancy, by the evidence which will be produced at the trial. The Respondent claims that the premises belong to the Petitioner. By the amendment to the written statement, the Petitioner accepts that the flat belongs to him.

6. In these circumstances, the Trial Judge was clearly in error in declining to allow the amendment. Interim Notice No.3621 of 2002 in RAD Suit 139 of 1996 shall accordingly stand absolute. The Petition is accordingly disposed of in the aforesaid terms. There shall be no order as to costs.